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IN THE

Supreme Court of the United States

October Term, 1964

No. 683

NICHOLAS LESSA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY K. CHAPMAN
Attorney for Petitioner
Nicholas Lessa
335 Broadway
New York, New York 10013

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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Petitioner, Nicholas Lessa, prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit, entered in the above case (sub nom. *United States* v. *Aviles,* No. 370, September Term, 1963, argued April 16, 1964, decided October 16, 1964, Docket No. 27377) on October 16, 1964 (Marshall, Circuit Judge, dissenting).

This is a companion petition with petitions of several other petitioners who were appellants in the *Aviles* case, *supra,* in the Court below.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit in support of the order and judgment entered October 16, 1964, is not yet officially reported. The

prior opinion of the United States Court of Appeals for the Second Circuit which is adhered to by that Court is reported at 315 F. 2d 186. The two relevant opinions of the United States District Court for the Southern District of New York are reported at 197 F. Supp. 596 and 200 F. Supp. 711.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Second Circuit was entered October 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner, Nicholas Lessa, adopts the respective "Questions Presented" in the companion petitions for certiorari which are being filed on behalf of the other petitioners in this case.

Specifically, petitioner, Lessa, presents the following questions:

1. Upon remand by this Court to the United States Court of Appeals for the Second Circuit requesting it to reconsider its decision (315 F. 2d 186) in light of *Campbell* v. *United States,* 373 U.S. 487, and for further consideration as may be appropriate (375 U.S. 32, 33), did the Court below err in determining that the interview notes of Assistant United States Attorney Shaw were not producible under 18 U.S.C. §3500?

2. Was the determination by United States District Judge Thomas F. Murphy that the said Shaw notes were

producible under 18 U.S.C. §3500 (200 F. Supp. 711) "clearly erroneous" under the doctrine of *Campbell* v. *United States, supra,* so as to allow the Court below to reach a contrary conclusion?

Constitutional and Statutory Provisions Involved

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States as well as 18 U.S.C. §3500. Leave is requested to omit the printing of these as well as of the opinion below because they are to be printed in the companion petition of Vito Genovese.

Statement of the Case

Petitioner, Nicholas Lessa, and the other petitioners, were convicted on April 17, 1959, of conspiracy to violate the Federal narcotic laws after a jury trial of three months in the United States District Court for the Southern District of New York. The convictions were affirmed by the United States Court of Appeals for the Second Circuit (274 F. 2d 179), and this Court denied certiorari (*Evola* v. *United States,* 362 U.S. 974, 982, rehearing denied, *Genovese* v. *United States,* 363 U.S. 858).

On August 26, 1960 the petitioners including this petitioner moved in the United States District Court for the Southern District of New York for a new trial pursuant to Rule 33, F. R. Cr. P. The bases of the application were summarized in the opinion of the Court below in its original affirmance of the orders denying the motions for a new trial, and are stated at 315 F. 2d at p. 188 as follows:

> "* * * (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of Federal Narcotics Agents Rowan, Consoli and Muglia, in violations of the Jencks Act, 18 U.S.C. §3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. §3500."

Pursuant to petitions for certiorari seeking review of the order and judgment of affirmance of the Court below, this Court remanded the cases requesting "reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487" and "such further consideration as may be appropriate," 375 U.S. 32, 33.

Upon remand the Court below adhered to its original affirmance of the denials of the motions for a new trial.

In connection with the Shaw notes the Court below followed the procedure of Judge Murphy, and divided the material into three groups, the second and third of which are as follows:

> "(2) Materials which were 'probably Jencks' statements.' Judge Murphy ruled that the nonpro-

> duction of this second group of materials, into which was placed 'the great majority' of Shaw's original interview notes, was nonprejudicial to appellants on the ground that 'virtually the[ir] entire contents' 'correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense.'
>
> (3) Notes which 'most assuredly should have been produced pursuant to §3500.' This group consisted of handwritten notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby: . . .'' 315 F. 2d 186, 188-89.

The Court below held upon remand that the Shaw notes were not producible material pursuant to 18 U.S.C. §3500 (the ''Jencks Act''); Circuit Judge Marshall dissenting.

The majority took the position that Judge Murphy's holding that the Shaw notes ''set forth in substance what the witness said'' (200 F. Supp. 711, 715) was not the proper test and was a mistaken view of the law. Therefore, ''the limited review of a district judge's findings prescribed by *Campbell II* does not apply, and, in consequence, we were free to determine the facts for ourselves.''

It made a distinction between the phrases ''set forth in substance'' and a ''substantially verbatim recital.'' It held that only if a statement was a ''substantially verbatim recital'' was the Court of Appeals limited by *Campbell II*, to the acceptance of such a finding of a district judge, unless it was clearly erroneous.

The Court below then continued, holding that its former decision was not inconsistent with *Campbell II*, and that the Shaw notes were not a "substantially verbatim recital" of Cantellops' story and "a new trial on account of the government's failure to produce them was rightly refused." The Court of Appeals once again made an independent finding that the Shaw notes were not producible.

Judge Marshall in his dissenting opinion, held that Judge Murphy did not use the wrong standard of law in determining whether the Shaw notes were "statements" and producible under the Jencks Act. He took the position that Judge Murphy's finding that the Shaw notes "set forth in substance what the witness said" is nothing less than a paraphrase of "substantially verbatim recital."

Judge Marshall continued that, in any event, even if Judge Murphy used the wrong standard of law, which he was not willing to concede, the majority of the court was in error in holding it was "free to determine the facts for ourselves." He maintained that in such situation the Court of Appeals was bound "to vacate the judgment of the district court, state the correct standard of law that should be employed by the district court and order a remand to the district court to make the appropriate findings of fact (Cf. *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Townsend* v. *Sain*, 372 U.S. 293 (1963)."

Reasons for Granting the Writ

(1) This case is now back before this Court for a second time in connection with the producibility of the Shaw interview notes pursuant to 18 U.S.C. §3500 (Jencks Act). There

is presented a very serious question concerning the administration of justice and due process, arising from the failure of the Government to make available to defense counsel during trial said notes for the purpose of cross-examination and impeachment of the witness, Cantellops, who occupied the central and principal role for the Government. The Court of Appeals for the Second Circuit has again made an independent factual finding and a de novo determination that the notes are not producible under the Jencks Act. Such a determination seems to be in conflict with this Court's decision in *Campbell* v. *United States, supra*. In that case, this Court referring to an Interview Report stated:

> "We think these questions properly are ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous."

The majority of the Court below, as pointed out by Circuit Judge Marshall in his dissenting opinion, has avoided the effect of the "clearly erroneous" doctrine by holding that Judge Murphy used a wrong standard of law in finding the notes producible.

Petitioner emphasizes, as stated by Judge Marshall, that Judge Murphy meant nothing more by the phrase "set forth in substance what the witness said" than a "substantially verbatim recital" which is the proper standard of law. As a matter of fact Judge Murphy frequently in his opinion used the phrase "substantially verbatim recital" in referring to the Shaw notes (200 F. Supp. 715-16).

In *Campbell* v. *United States, supra,* this Court in referring further to the Interview Report stated:

> "Although there may well be small differences as among the notes, oral presentation and Interview Report, it is not seriously suggested that there was a material variance or inconsistency among them."

Similarly, neither Judge Murphy, nor the Court below was able to find any material variance or inconsistency between the story Cantellops told Shaw and Shaw's interview notes. Shaw's notes are a "substantially verbatim recital", and were found to be so by Judge Murphy whose finding in this respect should not have been disturbed by the Court below because it was not "clearly erroneous."

The Court below stated that it was not Shaw's purpose to provide a record of Cantellops' story but to draft a chronological statement for himself and which would serve as a guide in interrogating him before a grand jury. Such a purpose would not effect their producibility under the Jencks Act.

In this connection the Court's attention is respectfully directed to the very recent decision of the United States Court of Appeals for the District of Columbia, *Williams* v. *United States,* decided October 1, 1964, and reported in United States Law Week, October 6, 1964, New Court Decisions (33 LW 2163), that the Jencks Act requires production of unsigned statements that had been orally given by prosecution witnesses to a grand jury clerk who contemporaneously recorded *"his version"* of them since they constituted "substantially verbatim" recitals. The object of the taking of the statements was to facilitate the presentation of cases to the Grand Jury by the office of the United States Attorney.

(2) Further, concerning the question of prejudice caused to the petitioner and the defense generally by the failure of the Government to produce the Shaw notes, on which Judge Murphy ruled there was no prejudice, it is very respectfully suggested that the impeachment purposes of a pre-trial statement of a witness may be better determined by defense counsel than a trial judge. And it should be observed that in the instant case, Judge Murphy was not the trial judge. It is for defense counsel, not for a trial court, to evaluate what is tactically useful for the defense in Jencks Act producible materials. *Scales* v. *United States,* 367 U.S. 203, 258; *Palermo* v. *United States,* 360 U.S. 343, 346; *Jencks* v. *United States,* 353 U.S. 657, 668-669; *Clancy* v. *United States,* 365 U.S. 312, 316.

(3) Petitioner, Nicholas Lessa, respectfully adopts all of the reasons for the granting of certiorari which are presented in the companion petitions.

CONCLUSION

For all of the reasons set forth in this petition and in the companion petitions it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

HENRY K. CHAPMAN
Attorney for Petitioner
Nicholas Lessa

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of October one thousand nine hundred and sixty-four.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO AVILES, et al.,

Defendants,

CHARLES BARCELLONA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

[redacted]

[redacted]

In the [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

BRIEF FOR THE [redacted] IN OPPOSITION

[redacted]

[redacted]
Solicitor General,

[redacted]
Assistant Attorney General,

[redacted]
[redacted]
Attorneys,
Department of Justice,
Washington, D.C., [redacted].

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 680

VINCENT GIGANTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 681

VITO GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 682

NATALE EVOLA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 683

NICHOLAS LESSA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 692

SALVATORE SANTORA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 659 Misc.

RALPH POLIZZANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 660 Misc.

CHARLES BARCELLONA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 712 Misc.

ROCCO MAZZIE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 798 Misc.

CHARLES DIPALERMO and JOSEPH DIPALERMO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. No. 680 App., 1-21; Pet. No. 681 App., 1-21) following remand from this Court *sub nom. Evola* v. *United States*, 375 U.S. 32, is not yet reported. Prior opinions of the court of appeals are reported at 315 F. 2d 186 and 274 F. 2d 179, certiorari denied, 362 U.S. 974, 982. The opinions of the district court (T. Tr. 9627-9693, 9834-9847; H. App. 1707-1755, 1784-1797) are reported at 197 F. Supp. 536 and 200 F. Supp. 711.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1964 (Pet. No. 680 App., 21). Mr. Justice Harlan extended the time for the filing of petitions for writs of certiorari in No. 798 Misc. to December 16, 1964. With one exception, the petitions were filed within the time as extended.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals, upon remand from this Court (375 U.S. 32), properly construed the Court's mandate.

2. Whether the court of appeals, upon concluding that the "clearly erroneous" standard of *Campbell II* was not applicable to the facts of the instant case, properly found that the "Shaw" notes were not producible statements under the Jencks Act.

3. Whether petitioners were entitled to a new trial because of the destruction by narcotic agents of their interview notes, even though the destruction occurred in good faith after the notes had been incorporated into reports and those reports were turned over to the defense at the trial.

---

[1] The petition in No. 712 Misc. was not filed until November 27, 1964, the 42nd day after judgment was entered in the court of appeals. Defendants Alfredo Aviles (who did not file for a new trial), Daniel Lessa (who did not appeal from the orders denying the new trial motions), and Carmine Polizzano (who did not file notice of appeal within the ten-day period) are not before this Court on the petitions for writs of certiorari.

STATUTE INVOLVED

Section 3500 of Title 18, U.S.C., provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * *
>
> (d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

I

INTRODUCTION

After a three-month trial in the United States District Court for the Southern District of New York before the late Judge Bicks and a jury, petitioners and others were convicted in April, 1959, of having conspired to violate the Narcotic Drug Import and Export Act, 21 U.S.C. 174, and were sentenced to varying terms of imprisonment ranging from five to twenty years. Their convictions were affirmed on appeal, 274 F.2d 179, and this Court denied petitions for writs of certiorari, 362 U.S. 974, 982.

In the latter part of 1960, petitioners moved for a new trial on grounds of newly discovered evidence, alleging that the principal government witness, Nelson Cantellops, had recanted his trial testimony and

that other evidence showed that he had given false testimony at the trial (T. Tr. 9431-9505, 9512-9550, 9552-9559; H. App 41-117). A protracted hearing on the motions was held before Judge Bicks, beginning in early 1961, during which the circumstances of the recantations were fully developed and Cantellops reaffirmed the truth of his trial testimony. Judge Bicks denied the motion for a new trial in so far as these grounds were concerned. See 197 F. Supp 536, 548-549.

During these proceedings, the court allowed the petitioners to amend their notions to include allegations that government agents had deliberately suppressed evidence by the destruction of records which otherwise would have been available at the trial (T. Tr. 9581-9584, 9585, 9586, 9588-9589; H. App. 120-124). These allegations related to the notes of narcotics agents, portions of whose reports had been turned over to the defense at the trial. Former Agent Rowan testified that he had destroyed his notes to avoid compliance with the decision in *Jencks* v. *United States*, 353 U.S. 657, and 18 U.S.C. 3500. Judge Bicks found that "Rowan's testimony as to his purpose at the time he destroyed the alleged notes, if in fact there were notes of the character claimed by him, [was] unworthy of belief" (H. App. 1741-1751). He found that Agent Consoli's notes were "handwritten accounts of selected portions of the interviews and hence not 'statements' within the Jencks statute" (H. App. 1752). He found no bad faith in the destruction of Consoli's notes after reports based thereon had been prepared and pointed out that the

reports had been made available to the defense at the trial (H. App. 1752).

It was also claimed by petitioners that the government had improperly failed to turn over to the defense, in response to the defense demand for production under 18 U.S.C. 3500 of statements by the witness Cantellops, the notes of former Assistant United States Attorney Donald Shaw.[1a] As to this issue, Judge Bicks ordered a further hearing, 197 F. Supp. at p. 558 (H. App. 1752-1755). In August, 1961, Judge Murphy was assigned the remainder of the case because of the illness of Judge Bicks (T. Tr. 9749; H. App. 1758). On the basis of his examination of the Shaw notes and the transcript of the hearings before Judge Bicks, Judge Murphy ruled that the Shaw materials should have been turned over to the trial court for an *in camera* inspection; and that many of the notes were either producible or probably producible documents under 18 U.S.C. 3500, but that their non-production did not prejudice petitioners or warrant a new trial (H. App. 1784-1797). 200 F. Supp. 711 Thus the motions for a new trial were denied *in toto.*

On appeal from the denial of the motion for a new trial, the court of appeals affirmed for the reasons given by Judge Bicks on the points which he decided. 315 F. 2d 186. With respect to the Shaw notes, however, its reasoning was different from that of Judge Murphy. It found, on the basis of the materials before it (discussed in more detail *infra*), that the notes

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[1a] This issue was first raised on pp. 94-98 of the brief of petitioner Genovese submitted to Judge Bicks after the hearing, a copy of which we are lodging with the Clerk of this Court.

were not producible statements under standards enumerated by this Court in *Palermo* v. *United States*, 360 U.S. 343. The opinion did not take up the question of harmless error. (In its opinion upon remand, the court of appeals said that it had previously found that it was "unnecessary to decide whether defendants had been prejudiced by the government's failure to produce the notes at the original trial" because it had found the notes non-producible (Pet. No. 681 App., 5-6, 7)). The government's brief in opposition to the petitions for writs of certiorari to review that judgment, filed shortly after the decision in *Campbell* v. *United States*, 373 U.S. 487, stated (Nos. 194-197, etc., O.T. 1963, p. 36):

> Under the ruling of this Court in *Campbell* v. *United States*, No. 631, O.T., 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500. There is thus no occasion to consider whether the court of appeals applied an improper standard in revewing these findings, or whether the court of appeals improperly defined and applied the term "substantially verbatim" in section 3500(e)(2), contentions advanced for consideration by petitioners. This Court, in *Campbell*, held that the factual findings and legal conclusions of the district judge in such matters are to be sustained on appellate review unless "clearly erroneous".

The position taken by the government was that the failure to turn over the notes did not in any event warrant the granting of a new trial. We argued (1) that, although the existence of the Shaw notes was

developed at the trial, no specific demand had been made therefor and no issue with respect thereto had been raised on appeal; and (2) that Judge Murphy's ruling that failure to turn over the notes was not prejudicial should be accepted (*id.* at 33-36). On October 21, 1963, this Court granted the petitions for writs of certiorari, vacated the judgment and remanded the cases to the court of appeals "for reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487, and for such further consideration as may be appropriate." *Evola* v. *United States*, 375 U.S. 32.

Thereafter, upon re-study of the record and the pertinent authorities, we concluded that we had mistakenly assumed that the *Campbell* decision controlled the question of the producibility of the Shaw notes. Accordingly, the Solicitor General authorized the United States Attorney to present that issue fully before the court of appeals. Thereafter, the case was re-briefed and re-argued to the court of appeals. On October 16, 1964, that court (one judge dissenting), after having fully considered its prior holding in the light of *Campell*, adhered to its decision that the Shaw notes were not producible statements under 18 U.S.C. 3500, and re-affirmed the orders of Judge Bicks and Murphy denying a new trial (Pet. No. 680 App., 1-21; Pet. No. 681 App., 1-21). In this regard, the court held that Judge Murphy's findings of producibility were not entitled to the usual weight accorded to eyidentiary findings of a district court because (1) those findings were based solely upon written materials and hence could not have "de-

pended upon nuances of testimony and demeanor of witnesses"; and (2) those findings were induced by a mistaken view of the law governing production of substantially verbatim recitals under section 3500 (e) (2) since Judge Murphy felt constrained to apply the same standard of production applied at the original trial (conducted before this Court's decision in *Palermo* v. *United States*, 360 U.S. 343)—that materials were producible if they set forth "in substance" what the witness had said. Since the court of appeals found that the Shaw notes were not producible statements, it found it unnecessary to decide the question whether a new trial should have been granted even if the notes should have been turned over at the trial (*ibid.*).

II

THE ISSUES

The principal issue now raised relates to the Shaw notes and we set forth below a summary of the record with respect thereto. With respect to other issues raised (relating to the destruction of the notes of narcotics agents whose reports were turned over to the defendant at the trial), the facts, in so far as they are not covered in our prior brief in opposition, are dealt with in the Argument.

A. THE TRIAL CONTEXT.

The government's evidence at the trial is summarized in the government's brief in opposition to the petitions for writs of certiorari to review affir-

mance of the convictions (Nos. 735, et al, O.T., 1959, pp. 5-16, 32-39). In general, the evidence showed that Cantellops made a number of trips to cities in the United States (Chicago, Cleveland, Las Vegas, Miami, Philadelphia and New York City) for the purpose of picking up or delivering wholesale quantities of heroin and cocaine either with or at the behest of various petitioners and others; that large quantities of heroin were imported into the United States through Puerto Rico and Florida from Mexico and Cuba; that a large number of narcotic transactions involving Cantellops, various petitioners and others were consummated; and that Cantellops, various petitioners and others attended meetings at which the importation, distribution and territorial control of narcotics were discussed and planned.

At the trial, towards the close of the government's direct examination of Cantellops, the court ordered the United States Attorney to make available to the defense all of Cantellops' grand jury testimony (T. Tr. 1392). Pursuant to defense demands under 18 U.S.C. 3500 for production of all copies of statements and reports of government agents dealing with the witness Cantellops (T. Tr. 1395, 1591-1592, 1610), the court ordered the United States Attorney to turn over such reports and statements (T. Tr. 1395-1396; see T. Tr. 1592) and other documents as well (see T. Tr. 2059; H. App. 1754, n. 23). The United States Attorney turned over to the defense a transcript of Cantellops' complete grand jury testimony, consisting of some 312 pages; two question-and-answer statements of Cantellops, dated October 10,

1957, and January 16, 1958, respectively; the United States Marshal's receipts indicating visits to the courthouse; and the medical records of Cantellops by the Veterans Administration and those at Rikers Island (T. Tr. 1392, 1400-1401, 1479, 1592, 2059, 3266-3268; see H. App. 1754, n. 23). In addition, the United States Attorney submitted to the court the complete files on the case of the New York Office of the Bureau of Narcotics, which consisted of some six or seven file jackets (T. Tr. 1592-1593, 1615, 2013-2014, 2018).

On February 4, 1959, the court announced that it had spent about 30 hours examining the Bureau files, and had culled out every report which dealt "in any wise with the witness Cantellops" (T. Tr. 2017, 2018, 2044-2045, 2052, 2054). The court then conducted *voir dire* examinations of four narcotic agents to determine if their reports were within 18 U.S.C. 3500 (T. Tr. 2013-2045). Judge Bicks told the agents that a "substantially verbatim" report or portion thereof was one which contained the "substance" of what the witness had told the agents (T. Tr. 2021, 2022, 2031, 2032, 2041, 2042-2043) and that it "need not be word for word" (T. Tr. 2032). Under this standard, although the agents did not show their reports to Cantellops and based their reports on notes (T. 2021-2022, 2031-2037, 2042), the court ordered the government to turn over to the defense portions of two of Matuozzi's reports (T. Tr. 2025); portions of six of Consoli's reports (T. Tr. 2033, 2035, 2037, 2038); portions of one of Enright's reports (T. Tr.

2042); and portions of one of Muglia's reports (T. Tr. 2043).

On February 18, 1959, at the suggestion of the government, the court conducted a *voir dire* examination of Narcotic Agent William Rowan (T. Tr. 3159-3173). Under its previously announced standard, the court ordered the government to turn over to the defense the pertinent parts of the four reports (T. Tr. 3172-3173) which Rowan testified constituted "faithful reflections" of his interview notes (T. Tr. 3163, 3167, 3168, 3169, 3170). Rowan testified that his notes of interviews with Cantellops, on which his reports were based, were not in existence, and the court refused to inquire, as suggested by counsel for Evola and Gigante, whether the notes had been destroyed (T. Tr. 3170).

Throughout the trial, Cantellops testified that he had been interviewed on numerous occasions between the summer of 1957 and into 1958 by Assistant United States Attorney Donald Shaw; that Shaw had examined him before the grand jury; and that thereafter he had been interviewed by Assistant United States Attorneys Walsh and Tendy, and by United States Attorney Arthur Christy (T. Tr. 1564-1566, 1579-1585, 1587-1591, 1631, 1651-1652, 1887-1890, 1896-1897, 1907-1909, 1935-1936, 1957-1958, 1963-1966, 2218-2228, 2257A, 2292, 2295, 2650-2651, 2867, 2904-2907, 2915, 2935-2950, 3441-3442, 3452, 3466-3468, 3527; see also T. Tr. 1934-1948, 2277-2278, 2281, 2296; G.J. 1, 31, 74, 123, 133, 171; 190). Stenographers were present at times during the in-

terviews with Shaw, and, on occasion, Cantellops observed Shaw taking notes or writing while he spoke (*e.g.*, T. Tr. 1584-1585, 1907-1909, 2218-2221). Assistant United States Attorneys Tendy and Walsh also sometimes took notes while Cantellops spoke (*e.g.*, T. Tr. 1587-1588). The interview notes taken by the Assistant United States Attorneys or by narcotic agents were not specifically requested by defense counsel during the trial, nor did the petitioners complain when the notes were not produced at the trial for an *in camera* inquiry by the court.[2]

B. THE SHAW NOTES

1. At the hearing before Judge Bicks on the motion for a new trial, Shaw testified that the instant case was initially under his supervision and that he worked on it about six months or so up to about March 1958 (H. App. 1624, 1629, 1637). During this period, Shaw interviewed Cantellops on 30 to 40 occasions, 20 to 30 of which involved discussions of the instant case (H. App. 1631-1632, 1633). He interviewed Cantellops at the courthouse, and took notes of what Cantellops said. The purpose for this note-taking was to assist Shaw in the preparation of a chronological statement of facts of the case and in

[2] Petitioners did not challenge on appeal from the convictions the various rulings or procedures undertaken by the court at the trial as to the production of materials under 18 U.S.C. 3500. In his petition for a writ of certiorari, petitioner Genovese contended that there was nothing in the opinion of the court of appeals to show that the court had given consideration to the rulings of the trial judge regarding production of reports of statements of Cantellops.

examining Cantellops before the grand jury (H. App. 1623-1625, 1626-1627, 1639).

Shaw testified that his notes were not substantially verbatim recitals of what Cantellops had told him because Cantellops spoke "too rapidly and his English was too poor" (H. App. 1623). He said that if his notes were "substantially verbatim" they would be in "an incomprehensible semi-English and Spanish fashion" (H. App. 1623). Shaw had to "almost translate" what Cantellops said and "put it into a more recognizable form of English" (H. App. 1623). Shaw did not necessarily preserve the notes in their original state (H. App. 1633). "Frequently [he] would go over the notes and put additional notes on them" (H. App. 1633-1634). Cantellops did not sign or initial the notes (H. App. 1639). Shaw did not read back or show his notes to Cantellops, nor did he request Cantellops to adopt them in any fashion (H. App. 1623). Shaw did not review his notes with Cantellops prior to the latter's appearances before the grand jury (H. App. 1638-1639).

On July 30, 1957, and on March 17-21 and 26-27, 1958, Shaw examined Cantellops before the grand jury (G.J. 1, 31, 74, 123, 133, 171, 190, 204). Shaw attempted to cover before the grand jury the "exact area" which Cantellops had discussed with Shaw during the interviews so that there would be a record before the grand jury of what Cantellops had told Shaw (H. App. 1625, 1627, 1640). Shaw used his notes in examining Cantellops before the grand jury, and, while the "nature of things" precluded 100%

correspondence between his notes and the grand jury testimony, Shaw believed that there was "substantial correspondence" between his notes of what Cantellops had told him and Cantellops' grand jury testimony (H. App. 1622-1623, 1624, 1625, 1626-1627, 1639, 1640).

During March 1958 or thereabouts, the case was transferred from Shaw to Assistant United States Attorney William Walsh (H. App. 1626, 1629, 1634). Shaw kept his notes in the case file, and the last he saw them was when the case was transferred to Mr. Walsh (H. App. 1629, 1634, 1639). At about that time, Shaw wrote a day-by-day chronological statement of facts based upon the grand jury minutes, his notes of interviews with Cantellops and other witnesses, information elicited from files of the Bureau of Narcotics, Customs Bureau, F.B.I., and the Internal Revenue Service, and his recollection (H. App. 1621, 1622, 1623-1624).

Judge Bicks reserved decision on this aspect of the motion, stating that he had not examined Shaw's original notes or chronology, that the record was silent as to what became of them after the case was transferred from Shaw in 1958, and that, accordingly, he would set the matter down for further *voir dire* examination into the Shaw papers (H. App. 1752-1755).

2. On August 14, 1961, after the case had been assigned to Judge Murphy because of the illness of Judge Bicks, government counsel gave to Judge Murphy two envelopes containing longhand notes and other writings made by Shaw (H. App. 1760-1761).

Government counsel stated that Shaw was outside the court room and available to the court, should the court, despite production of the Shaw documents, desire to hear testimony (H. App. 1761). Counsel for Genovese told the court that, in his opinion, the only light that Shaw could shed would be to identify the notes and chronology as that about which he had previously testified (H. App. 1770; see H. App. 1769). Later, counsel for Genovese requested that, after the court had inspected the documents, the court direct that Shaw's interview notes be made available to the movants in advance of the court's "final decision" regarding their producibility "because it might be that it would be necessary * * * for defense counsel to examine Shaw on those notes" (H. App. 1776; see H. App. 1778, 1779, 1780). All parties were of the opinion that the court should first read the documents (H. App. 1780, 1782, 1783). The court indicated that it would read the materials, write a "memorandum on it" and then set a date for a future meeting (H. App. 1782, 1783).

During the hearing, counsel for Genovese stated that, at the trial, Judge Bicks "emphasized that the statements need not be substantially verbatim", and that, in other words, Judge Bicks "was going to apply his own tests" (H. App. 1772-1773; see H. App. 1774, 1781). Government counsel subsequently stated to the court (H. App. 1782):

> I might say, your Honor, that Judge Bicks' liberality at the trial in turning over to the defense many extracts from agents' reports, which

purported to be the substance of what had come from the witness Cantellops, is in no ways binding on either Judge Bicks or your Honor. The question here now is, if they were to have been turned over, do they now meet the strict requirements of the Jencks statute; that is, are they now substantially verbatim—not whether they would have been under Judge Bicks' liberal use of the rule at the trial.

3. On December 22, 1961, Judge Murphy entered an order denying that portion of petitioner's motions for new trial upon which Judge Bicks had reserved decision (H. App. 1784-1797). 200 F. Supp. 711. He ruled that, notwithstanding the fact that petitioners had not at the trial specifically demanded production of Shaw's notes or a *voir dire* examination with respect thereto after they had been made "fully aware" of the fact that Shaw had interviewed Cantellops on a number of occasions and had taken notes at such interviews, petitioners' requests at the trial for all statements producible under 18 U.S.C. 3500 encompassed the Shaw materials (H. App. 1785-1787). For purposes of determining producibility, Judge Murphy stated that he would "apply the same standard applied by the trial court, and that is, 'do they set forth in substance what the witness said' " (H. App. 1788, 1790).

Judge Murphy ruled (1) that Shaw's chronology of facts was not a producible statement because it was not a substantially verbatim recital of what Cantellops had told him and was not written contemporaneously with the interviews; (2) that the "great

majority" of Shaw's handwritten notes were "probably" producible statements and that a *voir dire* by the trial judge would have resulted in the government's being ordered to turn them over to defense counsel; (3) that, with the exception of the notes of October 10 and 11, 1957, "virtually the entire contents" of the remaining notes corresponded with Cantellops' grand jury testimony, which had been turned over to the defense at the trial, and that, accordingly, no prejudice resulted from their nonproduction; (4) and that the nonproduction of the October 1957 notes, which he found producible, did not prejudice the petitioners since the notes could not have materially aided them, and nonproduction did not influence the result or unduly restrict their cross-examination of Cantellops (H. App. 1787-1797). In regard to the October 1957 notes, Judge Murphy noted that, while the question of prejudice could "rarely be answered in the negative without grave doubts," he nevertheless felt "confident" that petitioners were not prejudiced by nonproduction of the notes since the jury "gave credence to Cantellops' trial testimony notwithstanding his admitted prior perjury," and Cantellops had been subjected "to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked" (H. App. 1792, 1793). In this regard, he stated that Cantellops had admitted at the trial that he lied before the grand jury in July 1957 and March 1958, and that he lied in a question-and-

answer statement given to Shaw on October 10, 1957 (which had been turned over to the defense at the trial); that Cantellops testified that he put into operation a preconceived plan to stall for time during which he was to advance any story until he could be reached with bail money or legal assistance by others; that Cantellops was not co-operating during this period; and that it would be "difficult to see how an additional instance of fabrication, not under oath and at a time, consistently, when he was not yet co-operating with the government, could persuade the jury differently" (H. App. 1792-1793). Judge Murphy then ordered that copies of the October 10 and 11, 1957, notes be made available to the petitioners, and that the remainder of the notes be sealed (H. App. 1796).

C. SUBSEQUENT PROCEEDINGS.

1. Within ten days after Judge Murphy's order was filed, the petitioners filed their respective notices of appeal (see H. App. 1798-1799). Thereafter, upon application by the government (H. App. 1800-1802), Judge Murphy entered an order extending to January 12, 1962, the time during which the government might petition the district court for reargument (H. App. 1803). On January 10, 1962, the government, pursuant to Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York, moved the court for reargument of that portion of Judge Murphy's order which found Shaw's October 1957 notes to be producible state-

ments under section 3500 (H. App. 1804-1805), and submitted an annexed memorandum of points and authorities in support thereof (H. App. 1806-1813). In its memorandum (H. App. 1806-1813), the government requested the court to strike its finding of producibility of the October 1957 notes, thereby treating those notes "in the same manner as the other notes as to which the Court held only that failure to produce did not prejudice the defense" (H. App. 1807, 1812-1813). The memorandum also recited that the government was not seeking any additional hearings on the issue of producibility since the "finding [was] not a prerequisite to the result reached by the Court" (*i.e.*, that non-production was not ground for a new trial) (H. App. 1807, 1812-1813).

Since Rule 9(m) of the District Court rules did not authorize the filing of any affidavits in support of such a motion "unless directed by the court," the moving papers requested leave to file the affidavit of Donald Shaw, which was annexed thereto (H. App. 1804-1805). The affidavit stated, in pertinent part (H. App. 1814-1816):

> First, the taking of substantially verbatim notes of what this witness said generally was rendered impossible by the rapidity of his speech, its Spanish overtones, the frequent incoherence of his responses and an impediment resulting from missing front teeth.
>
> Secondly, my purpose was not to reproduce the witness' words in a substantially verbatim manner, but to prepare a witness sheet which could be used for further questioning before the Grand

Jury, for questioning other witnesses and as a basis for additional investigation. I knew that I would have the Grand Jury testimony as a statement of the witness' own words and in addition, if I did desire to take a substantially verbatim statement, it was my practice to arrange for the presence of a stenographer.

The notes evidenced substantial selectivity of what was said at the interview. The interview on October 10th lasted from 10:30 A.M. to 5:00 P.M., with a short time out for lunch. There are, I am advised, approximately 1146 words. The October 11th interview also lasted from approximately 10:30 A.M. to 4:45 P.M. without substantial interruption, and these notes, I am advised, contain approximately 1971 words. Omissions were made by me during periods of the interview when the witness was reluctant, fearful, uncooperative, vague and illogical, and when his statements were inconsistent with what I had previously been advised were the facts. There were often long periods of conversation before a single sentence was written down by me. When I did write something, I frequently did not write the witness' words but wrote something in a form which would make a coherent story and which could form the basis of a witness sheet to be used as an aid in questioning the witness on a subsequent occasion, particularly before the Grand Jury.

The notes contain interpolations and interlineations which are not the witness' own words. Parts of the notes were prepared some time after the interview. This process included editing, crossing out, interlineations and changes in sequence. My purpose here was to make the wit-

> ness sheets more coherent and logical. I felt free to add concepts which were probably true and logical, although not based on what the witness said, because of the aforementioned purpose for which the notes were being prepared.
>
> The fact that the notes are written in the first person and contain quotation marks does not indicate that they are a substantially verbatim reproduction of what the witness said. The use of the first person is a stylistic device employed by me incident to the preparation of a witness sheet. Quotations are used to indicate that a third person, not Cantellops, said something. The quotation marks are merely the normal punctuation used after the words "he said." As such the quotes do not mean that the words within the quotes are the exact words Cantellops said he heard. Rather they were intended to create a coherent, readable narrative.

Petitioners did not object to the limited filing of the Shaw affidavit. In his Memorandum in Opposition to the motion for reargument, petitioner Genovese argued that, with but a single "significant exception," the affidavit added "nothing of importance to the testimony given by Shaw before Judge Bicks" (H. App. 1819-1820). The significant new information he found in Shaw's affidavit was "revelation that Shaw deliberately omitted from the record of his interviews the portions of Cantellops' story which Shaw believed 'inconsistent' with the facts" (H. App. 1820-1821), and argued that, since Cantellops had been inconsistent with Shaw at the note-taking stages, the court might "deem Shaw's affidavit an appropriate

basis to reconsider its conclusion that the defense was not prejudiced by the withholding of Shaw's notes" (H. App. 1822-1823). On January 17, 1962, Judge Murphy entered an order denying the motion for reargument (H. App. 1827).

2. On February 14, 1962, petitioner Genovese moved the court of appeals for an order releasing those portions of the Shaw notes which Judge Murphy had previously ordered sealed. The application relied upon Shaw's affidavit, a copy of which was filed with the court in support of the motion. On February 23, 1962, the court of appeals granted the motion to the extent that Judge Murphy, in his discretion, might conclude that the notes were producible materials. On May 7, 1962, Judge Murphy released 61 additional pages of Shaw's notes (H. App. 1853-1913), noting that he deemed it more expedient to resolve the issue in favor of disclosure at that juncture without the delay and expense that a hearing for that purpose would entail (T. Tr. 9893-9894). He declined to make available 18 pages of "cryptic or cabalistic notes that never were, and are not now considered by us to be producible" (T. Tr. 9893).

On the appeal, as well as on the remand proceedings before the court of appeals, petitioners contended that the Shaw affidavit was not properly a part of the record before the court. The contention was rejected each time. In each of its holdings on the nonproducibility of the Shaw notes, the court based its decision, in part, upon Shaw's affidavit (Pet. No. 681 App., 13). See 315 F.2d at 192.

ARGUMENT

1. Much of the present petition filed by petitioner Genovese [3] is devoted to a discussion of whether the court below should have reconsidered the producibility of the Shaw notes in the light of (1) the government's brief in opposition to the petitions for writs of certiorari to review that court's prior decision affirming the denial of the motions for a new trial, and (2) the terms of the remand by this Court. 375 U. S. 32. We submit that petitioners are mistaken in their interpretation of the scope of the remand; and that the merits of the decision below do not call for further review by this Court.

As the court below pointed out, all that this Court directed in its remand was "reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487, and * * * such further consideration as may be appropriate"; the Court did not direct reconsideration in the light of the government's brief in opposition. Three members of this Court favored "plenary consideration" and therefore dissented in part from the Court's disposition. They pointed out "that in remanding these cases the Court neither decides that *Campbell* governs nor implies how the Court of Appeals should decide them"; and they indicated disagreement with the government's acceptance of Judge Murphy's finding that the Shaw notes should have been produced under

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[3] Reference is made only to the petition for a writ of certiorari filed by petitioner Genovese for the reason that the other petitioners have adopted and incorporated into their petitions the arguments made and positions taken in that petition.

18 U.S.C. 3500, stating that "the Court of Appeal's disposition [of this question] has support in the record and is worthy of argument" and, further, that the court of appeals was "correct in making factual determinations" because all the evidence was documentary. 375 U.S. at 33. Thereafter, upon further reflection and study of the record in preparation for the further proceeding in the court of appeals pursuant to the remand, we concluded that we were in error in accepting—as we did, for purposes of answering the prior petitions for certiorari—Judge Murphy's finding of producibility; we so stated to the court of appeals.[4]

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[4] It should be noted that, except for this change in the government's position as to the "acceptance" of Judge Murphy's finding, there has been no change in position by the government as to merits of the question of the producibility of the Shaw notes. Before Judge Murphy, before the court of appeals, the first time and the second, the government argued that the Shaw notes were not producible statements. Contrary to Petitioners' charge (Pet. No. 681, 32-36), there has been no change in position with respect to the fact that non-production of the notes did not warrant a new trial, although there has been a difference in emphasis on this issue. The government did argue before Judge Murphy that non-production of the Shaw notes, if error, was harmless. See page 48, n.16, of the government's brief submitted to Judge Murphy, which we are lodging with the Clerk of this Court. And as to the Shaw notes, Judge Murphy's decision denying the motions for a new trial rested squarely upon the ground that non-production was not prejudicial (H. App. 1784-1797). While it is true that the government did not brief or orally argue this point when the matter was before the court of appeals the first time, it by no means follows that the government "abandoned" the point for purposes of appellate review of Judge Murphy's decision. The ground of lack of prejudice—which Judge Murphy had documented in detail

While we do not discuss further the insufficiency of petitioners' claim of prejudice, relying upon our prior brief in opposition and Judge Murphy's findings, which discussed that matter in detail, we do point out, as bearing on the question of whether this Court should grant the petitions, that this case was tried in 1959, before the scope of 18 U.S.C. 3500 had been considered in the decisions of this Court, starting with *Palermo* v. *United States*, 360 U.S. 343. As noted, the fact that Shaw had taken notes of his interviews with Cantellops was fully disclosed at the trial. The fact that the government

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(H. App. 1792-1796)—was never repudiated. Government counsel did state to the court of appeals upon oral argument on the first occasion that the government would have "no argument" if the court determined that the government had "committed a wrong, acted improperly, withholding something, suppressed something of any materiality" in not producing the Shaw materials at the trial, but counsel was addressing himself to the *standard* of prejudice to be applied in the case. He said that the standard, under Second Circuit cases, would vary in proportion to "the nature of the wrongdoing by the Government counsel, assuming there to be some wrongdoing"; that Judge Murphy, who assumed that the government had "committed wrong" in not turning over the *Shaw* materials, applied a "very *liberal standard of prejudice*"; and that "that problem [*i.e.*, the nature of the standard of prejudice to be applied] *has to be decided by your Honors* on the basis of your understanding of what the nature of the Government counsel's response to the request was" (Tr. of oral argument, C.A. 2, December 18, 1962, pp. 120-121) (emphasis added). In this Court, in its prior brief in opposition to certiorari and in its brief in the court of appeals on the remand, the government argued at length the reasons why it believes non-production of the *Shaw* notes in nowise prejudiced petitioners, even if it were assumed that the notes were producible.

(which turned over its entire investigatory agency file to the court), the court (which adopted a very liberal standard of producibility), and defense counsel (who conducted a very vigorous defense throughout the trial) found it unnecessary to deal further with the Shaw notes indicates very clearly, we think, that at that time experienced attorneys and the presiding judge did not conceive that notes of government counsel in preparation for presentation of a case could be within the scope of 18 U.S.C. 3500. It is significant that no issue of non-production of the notes was raised on direct appeal or certiorari, and that this issue was not even the original basis of the motion for a new trial, which was predicated upon the alleged recantation by Cantellops (so discredited after the hearing that it has now disappeared as an issue). The question of whether this Court should review the judgment of the court below cannot be divorced from the fact that we are dealing here with a case tried six years ago, and investigated before that time.

2. We agree with the reasons given by the court of appeals for its ruling that the Shaw notes were not producible. It was not bound to defer to Judge Murphy's findings since he did not render his decision on the basis of live testimony and did not apply the correct standard as declared by this Court in *Palermo* v. *United States*, 360 U.S. 343.

a. In *Campbell* v. *United States*, 373 U.S. 487 (*Campbell II*), this Court held that findings of fact on questions of producibility of documents under the Jencks Act, 18 U.S.C. 3500, made by a district court which had examined the materials and heard testi-

mony *aliunde* regarding those materials, should not be set aside upon appeal unless those findings were clearly erroneous. The Court said (*id.* at 493):

> To determine the accuracy with which Toomey's oral presentation and Interview Report reproduced his notes was preeminently a task for a *nisi prius*, not an appellate, court. It required the *ad hoc* appraisal of one of the "myriad" "possible permutations of fact and circumstance," *Palermo* v. *United States*, *supra*, at 353, present in such cases; it may well have depended upon nuances of testimony and demeanor of witnesses; and it concerned a subject, rulings on evidence, which is peculiarly the province of trial courts.

In this case, Judge Murphy was neither the trial judge nor a judge who heard the testimony of live witnesses. He based his conclusion on the earlier testimony of Shaw before Judge Bicks on the motion for a new trial and on the documentary evidence consisting of the notes themselves. Since Judge Murphy had before him no witnesses and made no appraisals of credibility, his findings on producibility in no way depended upon "nuances of testimony and demeanor of witnesses". The rationale of *Campbell II*, accordingly, has no application to the instant case. Where findings of a district court are based upon written materials, the appellate court is as capable as the district court in evaluating such documents. *E.g.*, *United States ex rel. Binion* v. *O'Brien*, 273 F. 2d 495, 497 (C.A. 3), certiorari denied, 363 U.S. 812 (briefs and documents); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 569 (C.A. 2) (affidavits).

b. The case should not be decided on the basis of what the trial judge would have ruled six years ago at the time of trial. If that were so, then we think the issue could have been disposed of on the simple proposition that, although the existence of the Shaw notes was fully disclosed at the trial, it occurred to none—neither the judge, government, nor defense counsel—that they fell within the scope of 18 U.S.C. 3500. Nor can the case be decided on the basis that Judge Murphy decided it—that, assuming the Shaw notes could fall within the scope of 18 U.S.C. 3500, then in "determining whether Shaw's notes were producible, *i.e.*, whether they are 'statements' we apply the *same standard* applied by the trial court, and that is, 'do they set forth in substance what the witness said'" (H. App. 1788, 1790; emphasis added). Even if the trial judge had thought certain documents to be producible before *Palermo* was decided, the *Palermo* standard would have governed the question of non-production on direct review. The conviction would not have been reversed if the issue had been raised on direct review and the documents had been found to be non-producible under *Palermo*. Obviously, therefore, on a motion for a new trial, the standard is not what the trial court might have decided under his view of the law at the time of trial, but whether the documents at issue were producible documents under the statute as interpreted by the decisions of this Court, even if those decisions came subsequent to the trial. If the standard applied by Judge Murphy was improper under *Palermo* (and we show below that it was), the Court of Appeals was free to

disregard his findings on producibility. *E.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, n. 9 at 194; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394; *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 569 (C.A. 2).

3. As noted, Judge Murphy thought that documents should be deemed producible under the standard applied by Judge Bicks at the trial if "they set forth in substance what the witness said". That is not what this Court held in its intervening decision in *Palermo* v. *United States*, 360 U.S. 343, decided June 22, 1959, about three months after the conclusion of petitioners' trial. There the Court held that a 600-word summary made by a government agent of a 3½ hour conference with a witness was not a "substantially verbatim" recital of an oral statement within the ambit of 18 U.S.C. 3500(e)(2). The Court pointed out that a moving force behind the statute was the fear that an expansive reading of the *Jencks* decision by the courts might compel indiscriminate production of agents' summaries of interviews with witnesses, "regardless of their character or completeness", and that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own words * * *." *Id.* at 350.[5]

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[5] The Court stated (*id.* at 352):

> * * * It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment. It was important

a. Shaw's testimony at the hearing on the motion for a new trial before Judge Bicks shows that his notes were *not* substantially verbatim recitals of what Cantellops had told him. Shaw testified that Cantellops spoke rapidly and ungramatically; that he had "to almost translate" and put into a "more recognizable form of English" what Cantellops had told him; and that if he had taken substantially verbatim notes, the notes would have been in "an incomprehensible semi-English and Spanish fashion" (H. App. 1623).[6] A comparison of the grammatical notes with Cantellops ungrammatical testimony shows this to be true (compare, *e.g.*, H. App. 1829-1837 with H. App. 2005-2011). Shaw testified that he did not necessarily preserve his notes in their original state (H.

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that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. * * * [T]he legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions.

[6] Various narcotic agents, including Rowan, experienced similar difficulties in making notes of interviews with Cantellops (See H. App. 1130-1131, 1358, 1366).

App. 1633). "Frequently [he] would go over the notes and put additional notes on them" (H. App. 1633-1634). Under these circumstances, it cannot be said that Shaw's notes "could fairly be deemed to reflect fully and without distortion what had been said" by Cantellops, or that Shaw's notes "could properly be called [Cantellops'] own words." *Palermo* v. *United States*, 360 U.S. 343, 353. Neither would Shaw's notes qualify as statements under § 3500(e)(1), since Cantellops did not sign, initial or otherwise adopt them. The notes were not read back or shown to Cantellops, nor did Shaw review them with Cantellops prior to his testifying before the grand jury (H. App. 1623, 1638-1639).

Moreover, Shaw testified that his purpose in taking the notes was to aid him in drafting a chronological statement of facts and to aid him in his examination of Cantellops before the grand jury (H. App. 1623-1625, 1626-1627, 1639). As Shaw put it, "Well, when I would appear before the grand jury with Cantellops, I would go over the same area that I had previously elicited from Cantellops in my office so that there would be a record before the grand jury of what Cantellops had told me" (H. App. 1625). There was, in short, no occasion for Shaw to take substantially verbatim notes. Cantellops himself would provide the record of his story so far as Shaw was concerned.

b. The notes not only show on their face that there were substantial omissions, additions and alterations therein, but that their evident purpose was to

aid Shaw in his examination of Cantellops before the grand jury. The numerous instances in the notes of additions, alterations and re-arrangements of words and paragraphs, together with large-scale omissions from the notes and the use by Shaw of his words and grammar, all bespeak the efforts and mental processes of a lawyer at work in his preparation (to use Shaw's own term from his affidavit) of a "witness sheet". In his affidavit, Shaw said that his use of the first person was simply a "stylistic device" which he used "incident to the preparation of a witness sheet"; and that his use of quotation marks did not mean that the words within the marks were the exact words employed by Cantellops, but, rather, they were normal punctuation marks after the words "he said" to indicate that a third person—not Cantellops—said something, and were "intended to create a coherent, readable narrative" (H. App. 1815-1816).[7] Unquestionably, the notes were intended by Shaw to be a device or aid through which he prepared *himself* for examination of Cantellops in an orderly and logical manner before the grand jury. He used the notes for this purpose, and, as shown by Cantellops' testimony before the grand jury and our previous brief in opposition, Cantellops' grand jury testimony was not only in greater length and detail

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[7] During oral argument before the court of appeals on the remand, Judge Moore made the comment that when he took statements from witnesses years ago his practice was to use the first person and to indicate that the "witness will testify" to certain matters (Tr. of oral argument, C.A. 2, April 16, 1964, pp. 34-35).

than the information reflected in synoptical form in Shaw's notes but covered almost the entire substance of the notes.

We emphasize that the notes contain many instances of additions of materials, crossing-out of paragraphs and whole pages, and rearrangement of words and paragraphs (*E.g.*, H. App. 1829-1835, 1837, 1841, 1854, 1855, 1856, 1900). In fact, every page of the October 10, 1957, notes except the last page, which is a half-page, shows substantial alteration, interpolation and crossing-out (H. App. 1829-1836); and all but four pages of the October 11, 1957, notes bear at least one instance of similar treatment (H. App. 1837-1850). (The final two "pages" of the October 11, 1957, notes appear to contain nothing but meaningless utterances or jottings (H. App. 1851-1852)). The remaining "61 pages" of Shaw's notes contain similar alterations (*E.g.*, H. App. 1857-1860, 1862, 1873-1874, 1881, 1887, 1891, 1892, 1895, 1897-1899).

The length of the notes in comparison to the number of interviews shows that they were the product of conscious selectivity. Shaw testified that he interviewed Cantellops on from 20 to 30 occasions, and that Cantellops spoke "rapidly" (H. App. 1623, 1631-1633). The notes aggregate about 75 full pages (H. App. 1829-1913) and about 7,500 words (*ibid.*). Shaw spent about six hours with Cantellops during each of the October interviews (October 10 and 11, 1957), but only about 7¼ pages of notes and some 1146 words were taken on the first interview, and

only about 14 pages of notes and some 1971 words on the second (H. App. 1814-1816, 1829-1852). This represented about 3,000 words of notes made in a 12 hour span of interviewing a man who spoke "rapidly".

c. The affidavit of Shaw merely reinforces this conclusion. The affidavit repeats Shaw's testimony that he was not able to take substantially verbatim notes, that he had to use his own language, that he omitted matters from the notes and added others. The only new fact reflected in the affidavit (and that was implicit in Shaw's testimony) was, as petitioners themselves argued (see Statement, *supra* p. 24), that Shaw omitted those portions of Cantellops' story which Shaw believed to be illogical, incoherent or in conflict with what Shaw believed to be the facts (H. App. 1820-1821). This further shows that the notes are not substantially verbatim, since it would be unfair under the *Palermo* test to hold a witness to a statement from which significant portions were omitted by the notetaker.[8]

In view of the factors discussed above, it cannot be said, as petitioners argue (Pet. 681, 19-20), that the decision below moves "close" to the "restrictive"

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[8] Since petitioners relied upon this one possible new fact in the Shaw affidavit in opposing the government's motion for reargument in the district court and in obtaining an order from the court of appeals to require the district court to consider whether to disclose materials, they are in no position to argue (Pet. No. 681, 16-17, 24) that the court of appeals erred in placing some reliance upon Shaw's affidavit. Since the affidavit was relied upon by both sides, the court of appeals did not err in considering it.

application of substantially verbatim contained in the *Campbell* decisions of the First Circuit (296 F.2d 527 and 303 F.2d 747). In *Campbell*, the First Circuit said that section 3500(e)(2) "was limited to oral statements of a witness taken down contemporaneously by a stenographer or recorded mechanically or electrically or in some equivalent way, which would assure production by transcription, perhaps later, of a 'substantially verbatim recital' of what the witness said." 303 F.2d at 748; 296 F.2d at 532. That was not the standard applied below.

Nor is there a suggestion of conflict between the decision below and that of the District of Columbia Circuit in *Williams* v. *United States*, No. 18,462, 33 L. Wk. 2163, where the court of appeals rejected a finding of the district court that certain documents were "not substantially verbatim." That decision was not based simply upon the interviewer's testimony that he recorded the "substance" or the "heart" of the witness' statements, as petitioners suggest. The evidence showed further that the interviewer either typed the statement in full after the witness had completed his statement or typed a portion of it after the witness had given a part of his statement, concluding the typing after the witness had given the remainder. The interviewer testified that he never changed the witness' words "where to do so would materially alter the purport of the witness' statement." One of the purposes of the report was to provide a background to draft an indictment without the necessity of getting a grand jury transcript, whereas in the instant case the expectation was that the transcript of testi-

mony before the grand jury would be the definitive record of Cantellops' account.

4. The destruction of the notes of the narcotics agents, whose reports were turned over to the defense at the trial, presents no issue warranting review. As we show below, this case does not involve destruction of notes in bad faith. As to the notes which concededly were destroyed in good faith, the record shows that such notes were incorporated into reports which were turned over to the defense at the trial. Accordingly, the sanctions provided for in 18 U.S.C. 3500(d) would have no application, even if this issue were here on direct review, rather than on a motion for a new trial.[9] See *Killian* v. *United States*, 368 U.S. 231, 242, where this Court said:

> As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of [the witness'] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and if, after having served that purpose, they were destroyed by the

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[9] Defense counsel knew that Rowan's notes were not in existence at the time of trial (T. Tr. 3170). See the Statement *supra*, p. 14. No issue with respect thereto was raised on appeal. In no respect do the present contentions qualify as newly discovered evidence.

agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.

a. *Rowan's notes.*

Contrary to petitioner's assertion (Pet. No. 681, 28), there is no issue of bad faith in relation to the destruction of Rowan's interview notes. While Rowan did testify that he destroyed 40 or 50 pages of notes in order to circumvent the *Jencks* decision and statute, he was contradicted by the testimony of his fellow narcotics agents, by his superiors in the Bureau of Narcotics, by Shaw and by Bureau policy and procedure. (See the government's brief in opposition (Nos. 194-197, etc., O.T., 1963, pp. 20-27)). This evidence, when considered in light of Rowan's vacillating and self-contradictory testimony, his motives for misrepresentation (which included the hope of financial gain from counsel for Genovese and animosity toward at least one of his former superiors in the Bureau), and his admitted prior lies to Agent Gaffney and others, properly led Judge Bicks to conclude that Rowan's stated purpose for the destruction of his notes was "unworthy of belief" (H. App. 1741-1747). Judge Bicks said that a "far more plausible" reason for Rowan's destruction of such notes as he had was that "after having no further need for them, he destroyed them in accordance with his invariable practice" (H. App. 1747). Judge Bicks also ruled "that such notes as may have been taken by Rowan, whether handwritten or typed, could hardly have been

substantially verbatim recitals within the meaning of § 3500" (H. App. 1751).

Moreover, petitioners received the substance of Rowan's notes through receipt of portions of four of his reports. There is no genuine support in the record for petitioner's assertion that there were notes from Rowan in the file which contained as much writing as "17 to 34 pages of Shaw's notes" (Pet. No. 681, 30). Shaw testified that Rowan functionsd primarily as a "chaperone" to Cantellops during the period Shaw worked on the case (H. App. 1625, 1632); that, prior to leaving the case, Shaw received from Rowan about five typewritten pages of notes which were of no value to him in drawing up his chronology (H. App. 1621, 1626); and that Rowan's notes, which together with Shaw's notes were in the case file, were only a "small fragment, probably even less that that" in quantity in comparison to Shaw's notes (H. App. 1637-1638). During the period in question, Rowan wrote four reports from his notes, about the same number of reports as were submitted by Consoli, who was similarly situated (T. Tr. 2033, 2035, 2037, 2038, 3172-3173; H. App. 2058-2061).

In any event, since the defense did receive the reports which contained "faithful reflections" of Rowan's interview notes (T. Tr. 3163, 3167, 3168, 3169, 3170), the destruction of the interview notes is of no significance.

b. *Consoli's notes.* In his opinion, Judge Bicks found that Consoli's notes were not substantially ver-

batim recitals of what Cantellops had told Consoli, and that, in any event, petitioners received relevant portions of Consoli's reports which embodied his notes (H. App. 1752). He also observed that there was no suggestion that Consoli's notes were destroyed in bad faith (*ibid.*).

The court of appeals, believing that Judge Bicks had not ruled "on the question of whether the memorandum reports were a copy of the interview notes," stated that it would decide that question in light of the fact that Judge Bicks had died and in order to expedite the appeal (Pet. No. 681 App., 15). The court found that "those portions of Consoli's memorandum reports that purport to have been statements made by Cantellops are copies of Consoli's interview notes;" and that, accordingly, the good faith destruction of the notes did not call for sanctions under section 3500 (*id.* at 15, 16). In addition, after noting that Judge Bicks had limited his inquiries at the trial to those portions of the reports that were producible under section 3500(e)(2), the court said that this might not have been enough if other portions were producible under section 3500(e)(1). The court then held, after having examined all of Consoli's reports, "that everything in them which could possibly have been statements made by Cantellops was turned over to the defense" (*ibid.*).

Petitioners' effort to show (Pet. No. 681, 28-29) that Consoli had a large number of interviews with Cantellops and that "it cannot fairly be concluded that the defense received in the three memoranda copies of Consoli's numerous, destroyed interview

notes", distorts the record. The fact of the matter is that Consoli qualified his use of the word "interview," [10] and said that while he had seen Cantellops on "numerous occasions", he "actually interviewed him [only] half a dozen times" (H. App. 1644, 1647-1648). Consoli testified that he prepared about a half-dozen reports which embodied the substance of his notes; that the reports did not vary, add to or change that which was contained in the notes; and that the reports were of greater length and more specific than the notes (H. App. 858, 902). Since the defense received the pertinent portions of the reports, which included, as the court below pointed out, "everything in them which could possibly have been statements made by Cantellops," Consoli's good faith destruction of his notes would not have called for imposition of a sanction at any time.

c. *Muglia's notes.* At the trial, Agent Muglia testified that three paragraphs of his report of April 25, 1958, were substantially verbatim recitals of what Cantellops had told him, and that none of the information contained in paragraphs 1(a) through 1(g) of his April 22, 1958, report came from Cantellops (T. Tr. 2042-2043, 2044). Accordingly, the court ordered the government to turn over to the defense only three paragraphs contained in Muglia's April 25 report (T. Tr. 2043).

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[10] Consoli said that he interpreted the word "interview" to mean any occasion when he might have asked Cantellops a question, including those occasions when Shaw was interviewing Cantellops (H. App. 1647-1648).

At the hearing, Muglia testified that he believed that he interviewed Cantellops on two occasions; that he made handwritten notes of the "highlights" of the subjects in which he was interested; that the interviews dealt with subjects which Muglia needed in order to make further inquiry in other districts; that he believed that he had made two reports on the basis of his interview notes; and that, after the reports became part of the file, he destroyed his notes in accordance with his habitual practice because he no longer had any use for them and because of security reasons (H. App. 1357-1377). After examining his April 22, 1958, report (which had not been turned over to the defense at the trial), he said that while he could not remember the source of the information contained in paragraphs 1(a)-(g), this information did not come from Cantellops (H. App. 1385-1387, 1389-1390, 1403). There is thus no substance to petitioners' contention (Pet. No. 681, 29-30) that "one of Muglia's two sets of handwritten interview notes was not received by the defense, either directly or as copied into a typewritten report."

The corollary claim (*id.* at 29) that the destruction of Muglia's interview notes "prevents a determination whether the trial testimony regarding the source of the second typewritten report was false" is frivolous. Judge Bicks correctly found that the fact that Muglia at the hearing did not remember the source of the information contained in that report did not mean that he had lied at the trial (and at the hearing) that the source was not Cantellops (H. App. 1751). He noted that Muglia's "recent failure to

recall [was] not in the least inconsistent with trial testimony given in closer proximity to the event" (H. App. 1751).

CONCLUSION

As we have undertaken to show in some detail, the issues have been most thoroughly canvassed in the court of appeals and there is no occasion for further review. The petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

ROBERT S. ERDAHL,
RICHARD W. SCHMUDE,
Attorneys.

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